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IN THE

Supreme Court of the United States

October Term, 1972

NO. 72-5082

BERNARD G. WOCHER,
Petitioner,

vs.

LOS ANGELES CITY SCHOOL DISTRICT BOARD OF EDUCATION AND/OR PERSONNEL COMMISSION,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALFORNIA, SECOND APPELLATE DISTRICT.

THE OPINIONS BELOW

The proposed decision of the hearing officer subsequently adopted by the respondent Los Angeles City Unified School District Personnel Commission, is set forth in Appendix "A" of the petition. The Findings of Fact and Conclusions of Law and the Judgment of the Superior Court is set forth in Appendix "B" of the petition. The opinion of the Court of Appeal of the State of California, Second Appellate District, Division Two, is set forth in Appendix "C" of the peti-

tion. The decision of the Supreme Court of the State of California denying hearing is set forth in Appendix "D" of this brief.

JURISDICTION

The jurisdictional requisites, disputed by these respondents, are set forth in the petition.

QUESTIONS PRESENTED

1. Whether the application of Personnel Commission Rule 735(K) deprived petitioner of a fair hearing, constituting a denial of due process.
2. Whether the Equal Protection and Due Process clauses of the Constitution required that the petitioner receive a free transcript of his administrative proceedings and free legal counsel.
3. Whether the petitioner has raised any valid constitutional issues that could be reviewed by this Court.

STATUTES INVOLVED

1. Los Angeles City Unified School District Personnel Commission Rule 735(K).

STATEMENT OF THE CASE

On June 25, 1970, appellant was presented with a letter of dismissal from the Los Angeles City School District. Petitioner filed an appeal with the respon-

dent Los Angeles City School District Personnel Commission. A hearing was thereafter conducted, at which time petitioner was represented by his attorney, Donald K. Cohen, during three days of the six-day hearing. After hearing the evidence, the hearing officer determined that sufficient grounds existed to justify the dismissal of the petitioner. Thereafter, on November 4, 1970, the respondent Personnel Commission adopted the proposed decision of the hearing officer as its own decision, and sustained the dismissal.

On January 4, 1971, the Superior Court granted the petitioner's amended petition for an Alternative Writ of Mandate. After both parties had filed numerous affidavits, declarations, exhibits, and points and authorities, the matter was argued on February 24, 1971 by both parties. The court on that date ordered the Alternative Writ discharged and denied the peremptory Writ. Judgment was accordingly entered on March 9, 1971. Petitioner then appealed the decision of the Superior Court to the Court of Appeal of the State of California, Second Appellate District, Division Two.

The above mentioned court sustained the judgment of the Superior Court on March 20, 1972.

Petitioner then filed for a hearing before the Supreme Court of the State of California. Petitioner's request for a hearing before the Supreme Court of the State of California was denied on May 18, 1972.

REASONS FOR DENYING THE WRIT

I

THE APPLICATION OF LOS ANGELES UNIFIED SCHOOL DISTRICT PERSONNEL COMMISSION RULE 735(K) AT PETITIONER'S HEARING DID NOT DEPRIVE PETITIONER OF A FAIR HEARING CONSTITUTING DENIAL OF DUE PROCESS.

Petitioner alleges on pages 4, 5, and 14 of his petition that Personnel Commission Rule 735(K), which deals with the burden of proof in a administrative hearing, deprived petitioner of a fair hearing and resulted in a denial of due process. Personnel Commission Rule 735(K) as it existed at the time of petitioner's hearing is set forth in full as Appendix "E" to this brief.

It should be noted that Personnel Commission Rule 735(K) provided that the party responsible for the dismissal was obligated to first present its case to the commission. In reviewing petitioner's case, the Court of Appeal of the State of California, Second Appellate District, Division Two, stated:

> "Thus, although Rules 735(K) does state that the burden of proof is upon the person . . . dismissed," an appellant in a hearing before the Personnel Commission does not bear all the obligations traditionally considered to be embodied within the term "burden of proof." The burden of going forward with the evidence initially lies with the school district. The burden of producing evi-

dence shifts to the dismissed employee only after the school district has put on its case. For all practical purposes, then, the reference "burden of proof" in Rule 735(K) refers to the burden of going forward once a rebuttable presumption has been established by the school district."

Thus, it is submitted that the petitioner was not deprived of any rights resulting in a fundamentally unfair hearing. The petitioner was fully apprised of the charges before him, and the school district was obligated to present all of its evidence against the petitioner before petitioner had any obligation to respond.

Furthermore, Personnel Commission Rule 735(K) is presently constituted has deleted the reference to burden of proof. Personnel Commission Rule 735(K) as presently constituted is set forth in full as Appendix "F" to this brief. In *Rice v. Sioux City Cemetery* 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1954) this court, presented with an important constitutional problem, dismissed the petition upon discovery that a new state statute prevented the constitutional problem from arising again in that state. It was stated at page 74 (supra) that before this court would rule on an issue, the problem must be "beyond the academic or episodic."

II

PETITIONER DID NOT REQUEST A FREE TRANSCRIPT OR FREE LEGAL COUNSEL UNTIL AFTER THE TRIAL COURT HAD ENTERED JUDGMENT DISCHARGING THE ALTERNATIVE WRIT OF MANDATE AND DENYING THE PEREMPTORY WRIT OF MANDATE.

Petitioner alleges at pages 7, 8, 11, 13 and 14 that as an indigent he was entitled to free legal counsel at public expense at the administrative hearing level, the trial court level, and during the various appellate proceedings. He also alleges that as an indigent he was entitled to a free transcript of the administrative proceedings at public expense for use at the trial and appellate levels. Petitioner cites *Meyer v. City of Chicago*, 404 U.S. 189, 92 S.Ct....., 30 L.Ed. 2d 372 (1971) to support his arguments. However, the *Meyer* case involved the right of an indigent in a misdemeanor criminal proceeding to a free transcript to pursue his appeal. The ruling of this Court did not pertain to civil proceedings or administrative proceedings, as in the case at bar.

Assuming arguendo that an indigent individual is entitled to appointed counsel at public expense at administrative hearings and at the trial court level in civil proceedings, and that an indigent individual is entitled to transcripts of administrative proceedings to pursue civil remedies at the state trial and appellate court levels, petitioner failed to prove at the ad-

ministrative level or at the trial court level that he was in fact indigent. Petitioner was represented by private counsel throughout three days of his six day hearing. (See Appendix "A")

Petitioner made no request at the trial court level before judgment was entered for a finding that the petitioner was indigent, nor did the court find the petitioner to be in fact indigent. No request was made by petitioner by either written documents or oral arguments for counsel to be appointed at public expense. Likewise, petitioner made no request to the trial court in any written document or in oral argument for a free transcript of the administrative proceedings. Indeed, petitioner's only reference to inability to pay for a transcript of the administrative proceeding before entry of Judgment was a one sentence reference within an 8 page unsworn document filed with the trial court on the date that the court ruled that the Alternative Writ of Mandate should be dismissed and the Peremptory Writ be discharged. Furthermore, the petition presented to this court itself places in doubt the alleged indigency of the petitioner. On page 11, petitioner alleges that he pleaded indigency and requested a free transcript. However, in the next paragraph petitioner indicates that he "pleaded for the case to be returned to the Superior Court in Los Angeles and he would borrow the $2,000 cost of the transcript." In a case involving the right to a free transcript in a criminal proceeding, it has been held that a petitioner is not entitled to a free transcript at p u b l i c expense

where the petitioner has the means to obtain funds for a transcript on the basis of his personal credit. *State v. Rutherford* (1964) 389 P. 2d 895.

Under these circumstances, it is submitted that petitioner's situation hardly falls within the holding of *Meyer v. City of Chicago* (*supra*). In that case, the trial court made a specific finding that the petitioner was indigent, and then went on to deny the petitioner a free transcript of the trial court proceedings. In the case at bar, no request of the trial court was made for a ruling as to the indigency of petitioner before judgment was entered, and the trial court made no finding as to indigency. Petitioner attempted to raise the issue of indigency only after he had received his day in court, had lost, and judgment had been entered.

III

THE TRIAL COURT'S DECISION IS SUPPORTED BY SEPARATE, INDEPENDENT GROUNDS THAT PETITIONER HAS FAILED TO ATTACK AS UNCONSTITUTIONAL.

Petitioner has alleged that the trial court's failure to provide a free transcript of the administrative proceedings constituted a denial of due process. However, the providing of a free transcript of the administrative hearing at public expense by the respondents would merely have aided the petitioner in sustaining his burden of proof at the trial court level; the providing of a transcript could not have cured a fatal defect in the plaintiff's pleadings.

The trial court in its Findings of Fact and Conclusions of Law found that the petitioner had failed to specifically attack the findings of the administrative hearing officer. (See Appendix "B") It is submitted that this failure of petitioner's petition or any of his amended petitions to specifically attack the findings of the administrative hearing officer in and of itself constitutes grounds for the trial court to discharge the Alternative Writ of Mandate and deny the Peremptory Writ. It has been held that in a mandamus proceeding to review the order of an administrative board, any finding that is not specifically attacked must be accepted as true. *Black v. State Personnel Board* (1955) 136C.A. 2d 904, 289 P. 2d 863; *Stuck v. Board of Medical Examiners* (1949) 94 C.A. 2d 751, 754-755, 211 P. 2d 389. In the case at bar, petitioner failed to single out and attack any of the hearing officer's findings. It is submitted that the hearing officer's findings (Appendix "A"), which the trial court was therefore bound to accept as true, constituted valid grounds supporting the trial court's Conclusions of Law.

Therefore, even assuming that the petitioner has raised valid constitutional arguments, it is submitted that this court should not grant a certiorari because of the presence of non-constitutional issues which in themselves serve as an adequate ground for disposition of this case. *Alma Motor Company v. Timken-Detroit Axle Co.*, 329 U.S. 129, 67 S. Ct. 231, 91 L. Ed. 128 (1946).

IV

THE BULK OF PETITIONER'S ALLEGED ISSUES MERELY REQUEST THE COURT TO REVIEW FACTUAL ISSUES PRESENTED AT THE ADMINISTRATIVE LEVEL, THE TRIAL COURT LEVEL, AND THE APPELLATE LEVEL.

Although petitioner couches his arguments in constitutional language, the bulk of petitioner's presentations to this court constitute requests for a review of factual issues and evidence. For instance, paragraph 10 of "Questions Presented" on page 6 of petitioner's brief indicate that the hearing officer deprived the petitioner of "equal protection of the laws" and "due process of law." However, a closer examination of this paragraph reveals that petitioner is actually requesting this court to determine whether or not the hearing officer asked the petitioner to surrender his rebuttal rights; whether the hearing officer indicated to the department that it had not presented sufficient evidence to warrant dismissal; and whether the hearing officer had admonished a witness for failing to answer the petitioner's questions. It should be noted that the bulk of petitioner's "Questions Presented" fall within the same category. It is therefore submitted that these arguments do not merit review. This court has stated, "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston,* 268 U.S. 220, 227, 69 L.Ed. 925 (1925).

The situation is similar regarding petitioner's

"Reasons for Granting the Writ." In addition, most of petitioner's arguments in this portion of his petition are conclusionary expositions of petitioner's sociological beliefs. For instance, it is impossible for these respondents to reply to petitioner's argument No. 8 on page 15 because said argument merely presents a vague, unspecified feeling of resentment against administrative discharge hearings.

Finally, it should be pointed out that paragraph 5 on page 13 of the petition appears to be entirely erroneous. The Supreme Court of California has made only one ruling in this case: It has denied the petitioner a hearing. The Supreme Court of California has made no previous rulings in petitioner's favor as to the case at bar.

CONCLUSIONS

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN D. MAHARG,
County Counsel

By LEE BARKER,
Deputy County Counsel

Attorneys for Respondents

APPENDIX "A"

LOS ANGELES CITY UNIFIED SCHOOL DISTRICT PERSONNEL COMMISSION

In the Matter of the Dismissal of)
BERNARD G. WOCHER (EN144736))
PERMANENT SENIOR AUDITOR)

CASE NO. 7
OLA 24344

DECISION

The attached Proposed Decision of the Hearing Officer is hereby adopted by the Personnel Commissioner of the Los Angeles City Unified School District as its decision in the above-entitled matter.

This decision shall become effective on the 4th day of November, 1970.

IT IS SO ORDERED this 4th day of November, 1970.

PERSONNEL COMMISSION OF
THE LOS ANGELES CITY
UNIFIED SCHOOL DISTRICT

By ROBERT FISHER
Personnel Director

LBT:ej

LOS ANGELES CITY UNIFIED
SCHOOL DISTRICT
PERSONNEL COMMISSION

In the Matter of the Dismissal of)
BERNARD G. WOCHER (EN144736))
PERMANENT SENIOR AUDITOR)

CASE NO. 7
OLA 24344

PROPOSED DECISION

This matter came on regularly for hearing before Leon B. Traub, assigned Hearing Officer of the Office of Administrative Procedure, at the Administration Offices of the Los Angeles City Unified School District on September 23, 1970, at 9:00 a.m., and was heard on that date and on September 28, September 30, October 1, October 8, and October 9, 1970. Ron Apperson, Deputy County Counsel, at all times appeared for the complainant. Donald K. Cohen, Attorney at Law, appeared for the appellant on September 28, September 30, and October 1, 1970. Thereafter, the appellant appeared in propria persona.

Evidence both oral and documentary having been received, the matter was submitted and the Hearing Officer now proposes the following decision:

I

Appellant, Bernard G. Wocher, is a permanent classified employee of the Los Angeles City Unified School District, holding and occupying the position of Senior Auditor assigned to the Auditing Section, General Accounting Branch of the Controlling Division, and he has been so employed since March, 1968.

II

On July 14, 1970, appellant was dismissed from that position effective at the close of business July 14, 1970.

III

Appellant served notice of appeal from that action. All procedural requirements have been met.

IV

The grounds upon which appellant was dismissed are as follows:

1. Incompetency
2. Inattention to or dereliction of duty
3. Discourteous treatment of fellow employees
4. Engaging in political activities during assigned hours of employment

INCOMPETENCY

V

There was insufficient proof and it is therefore found to be not true, that appellant's work production is significantly below the average of the remainder of the staff.

VI

Appellant, in reporting many audits of cafeterias, failed to prepare the audit reports properly, some illustrations of which are: cash accounts altered, change funds not accounted for, cash register readings not reconciled to collection records, failure to question delays in the banking of special event proceeds, failure to furnish information in audit comment sheets to support his memoranda of audit, filing reports and audit papers in wrong year's (paper) file.

VII

Appellant's auditing performance was substandard on some occasions, examples of which are as follows:

(a) His audit of Franklin High School was inadequate. His supervisor wrote and furnished a list of 70 questions needed to explain this audit. Appellant answered the list inadequately. Respondent, upon finishing his work at this school, left the school records in disorder.

(b) Appellant's audit of Carnegie Junior High School was inadequate. It was necessary for his sup-

ervisor to prepare a list of 50 questions for appellant to answer. His reply was inadequate and indicated a lack of sufficient examination of the school affair.

INATTENTION TO OR DERELICTION OF DUTY

VIII

Appellant failed to follow instructions not to attempt to audit where school records were not in adequate condition for audit, on June 20, 1969, at Fremont High School (student body and cafeteria) and in March, 1970, at Carver Junior High School (cafeteria).

IX

In October, 1969, at Benjamin Franklin High School, appellant refused to follow the instructions of his supervisor, leading to an argument between them, in the presence of some of the school staff and its students.

X

In October, 1969, March, 1970, and May, 1970, appellant failed to keep and submit true reports of his time and mileage for the use of his automobile.

XI

On December 30, 1969, appellant, at his desk in the offices of the Division in which he worked, used a small amount of time for which he was paid to engage

in a personal matter related to his campaign for public office, that is, the copying of a list of names from a telephone directory.

XII

On or about March 10, 1970, appellant used office time intended for the completion of assigned cafeteria audits, in developing an audit program for general use in the audit of cafeterias, which he was not assigned to do.

DISCOURTEOUS TREATMENT OF FELLOW EMPLOYEES

XIII

On December 8, 1969, appellant engaged in an argument with the Head Auditor, in the presence of other employees in the office in which they worked, verbally castigating the Head Auditor for the contents of a letter the latter had addressed to the head of the Division relating to time and mileage reports submitted by appellant.

On April 17, 1970, appellant in the presence of the Principal Auditor told the Head Auditor he would not obey an order to engage in discussions with cafeteria managers at the time and at the scene of the audits without a written directive.

On May 12, 1970, appellant, at Wilson High School, in the presence of the Financial Manager of the High

School, became argumentative and accusatory of the supervisory personnel of the Division in which he worked.

ENGAGING IN POLITICAL ACTIVITY

XIV

While a candidate for elective public office, on March 2, 1970, respondent issued a mimeographed news release tothe news media relating to his candidacy, containing the phone number of his office at the Division in which he worked for the School District, with the written statement appearing on that memo "He [appellant] may be reached at 213-653-7880." Appellant retracted this release after complaint by his supervisor.

On October 27, 1969, appellant, in the office in which he was employed, told a fellow employee of his candidacy but he did not solicit the latter's vote.

On December 30, 1969, appellant, in the office in which he was employed, compiled a list of names from a telephone directory for use in his political campaign, at a time when he was engaged by the School District to work in School District affairs.

On April 17, 1970, appellant tore a page from a local telephone directory in the office in which he was employed, the page containing a list of Republican Party Clubs.

XVI

All allegations of charges against the appellant not found to be true are now found to be untrue.

XVII

Appellant, 58 years of age, and an auditor of many years' experience, did not find himself able to conform to the methods and procedures required of all auditors, and especially of all senior auditors employed in the auditing section.

* * * * *

Pursuant to the forgoing findings of fact, the Hearing Officer makes the following determination of issues:

Grounds exist to dismiss appellant Bernard G. Wocher from his position as Senior Auditor under the provisions of Article 3, of Chapter 3 of Division 10 of the Education Code and Rule 735 of the Rules of the Personnel Commission for the following reasons:

1. Appellant has demonstrated incompetency to hold the position.

2. Appellant was inattentive to instructions in the procedure and methods to be employed in the performance of his duty as Senior Auditor.

3. Insufficient evidence of discourteous treatment to fellow employees exists to warrant dismissal.

4. Insufficient evidence of engagement in political

activities to the detriment of the School District is found to warrant dismissal.

* * * * *

WHEREFORE, THE FOLLOWING ORDER is hereby made:

The order of dismissal is sustained without modification.

I hereby submit the foregoing which constitutes my proposed decision, in the above entitled matter, as a result of the hearing had before me on the above-mentioned dates at Los Angeles, California, and recommend its adoption as the decision of the Personnel Commission of the Los Angeles City Unified School District.

LEON B. TRAUB,
Hearing Officer

DATED: October 21, 1970

APPENDIX "B"

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

BERNARD G. WOCHER,
Petitioner,
vs.
BOARD OF EDUCATION OF THE LOS ANGELES CITY SCHOOL DISTRICT, and PERSONNEL COMMISSION OF THE LOS ANGELES CITY SCHOOL DISTRICT,
Respondents.

NO. 991 467

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter came on regularly for hearing before this court on February 24, 1971 in Department 65 of the above entitled court, the Honorable Parks Stillwell, Judge presiding, pursuant to the verified Petition of Bernard G. Wocher, and the Alternative Writ of Mandate and Order to Show Cause issued by this court and served on each of the Respondents in the manner provided by law. Petitioner Bernard G. Wocher appeared in propria persona, and Lee Barker, Deputy County Counsel, appeared as attorneys for Respondents.

No record of the administrative proceedings having been received into evidence, the Respondents having filed an Answer to the Petition, and each side having submitted Memorandums of Points and Authorities in support of their respective contentions and having fully argued the matter orally before this Superior Court Judge.

FINDINGS OF FACT

I

That the Petitioner failed to specifically attack the findings of the administrative hearing officer.

II

That the Petitioner failed to support his allegations by providing a transcript of the administrative hearing.

III

That the Petitioner has failed to rebut the presumption that the administrative hearing was regularly performed.

From these facts the court makes the following:

CONCLUSIONS OF LAW

I

That the Petitioner has failed to rebut the presumption that the administrative hearing was regularly performed.

II

That the Respondents proceeded in the manner required by law and the manner in which the administrative hearing was held was not an abuse of discretion or without or in excess of jurisdiction.

III

That there was substantial evidence to support the reasonableness of the administrative decision.

IV

That Judgement should be entered discharging the Alternative Writ of Mandate issued in this action and denying a Peremptory Writ.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: MARCH 8, 1971.

PARKS STILLWELL,
Superior Court Judge

That the Petitioner has failed to rebut the presumption that the administrative hearing was regularly performed.

From these facts the court makes the following:

CONCLUSIONS OF LAW

I

That the Petitioner has failed to rebut the presumption that the administrative hearing was regularly performed.

II

That the Respondents proceeded in the manner required by law and the manner in which the administrative hearing was held was not an abuse of discretion or without or in excess of jurisdiction.

III

That there was substantial evidence to support the reasonableness of the administrative decision.

IV

That Judgment should be entered discharging the Alternative Writ of Mandate issued in this action and denying a Peremptory Writ.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: MARCH 8, 1971.

PARKS STILLWELL,
Superior Court Judge

BERNARD G. WOCHER ,)
Petitioner,)
vs.)
BOARD OF EDUCATION OF THE)
LOS ANGELES CITY SCHOOL)
DISTRICT, and PERSONNEL COM-)
MISSION OF THE LOS ANGELES)
CITY SCHOOL DISTRICT,)
Respondents.)

NO. 991 467

JUDGMENT DENYING WRIT OF MANDATE

This matter came on regularly for hearing before this court on February 24, 1971 in Department 65 of the above entitled court, the Honorable Parks Stillwell, Judge presiding, pursuant to the verified Petition of Bernard G. Wocher, and the Alternative Writ of Mandate and Order to Show Cause issued by this court and served on each of the Respondents in the manner provided by law. Petitioner Bernard G. Wocher appeared in propria persona, and Lee Barker, Deputy County Counsel, appeared as attorney for Respondents.

The Respondents having filed an Answer to the Petition, and each side having submitted Memorandums of Points and Authorities in support of their respective contentions and having fully argued the matter orally before this court, and the cause having been submitted for decision,

IT IS ORDERED, ADJUDGED AND DECREED THAT:

The Alternative Writ of Mandate issued in this action be and it is hereby discharged.

The Peremptory Writ of Mandate is denied.

Dated: _____, 1971.

PARKS STILLWELL,
Superior Court Judge

Judgment entered on

_____, 1971.

In the Judgment Book, Volume

No._____, Page _____.

WILLIAM G. SHARP, County Clerk

By_____
Deputy

APPENDIX "C"

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

BERNARD G. WOCHER,
Petitioner and Appellant,
vs.
LOS ANGELES CITY BOARD OF EDUCATION-LOS ANGELES CITY SCHOOL DISTRICT PERSONNEL COMMISSION,
Defendants and Respondents.

2d CIV. NO. 38841
(Sup. Ct. #991,467)

APPEAL from a judgment of the Superior Court of Los Angeles County. Parks Stillwell, Judge. Affirmed.

Petitioner and Appellant Bernard G. Wocher in pro. per.

John D. Maharg, County Counsel, and Lee Barker, Deputy County Counsel, for Defendants and Respondents.

Plaintiff appeals from the judgment of the superior court denying his petition for writ of mandate. The writ has sought to compel respondents to reverse their determination that appellant was properly dis-

charged from his position as senior auditor with the Los Angeles City School District.

On June 25, 1970, appellant was presented with a letter of dismissal, and two days later he filed an appeal with respondent Los Angeles City School District Personnel Commission. A hearing was conducted by the hearing officer on six days between September 23, 1970, and October 9, 1970. Mr. Wocher was represented by his attorney, Donald K. Cohen, on September 28, September 30, and October 1, 1970, and thereafter for the remainder of the hearing and in all subsequent proceedings, including this appeal, Mr. Wocher represented himself.

After hearing the evidence, the hearing officer determined that sufficient grounds existed to justify the dismissal of appellant from his position under provisions of Chapter 3 of Division 10 of the Education Code and Rule 735 of the Rules of the Personnel Commission. The specific finding constituting grounds for dismissal was that the appellant had demonstrated incompetency to hold the position in that he was inattentive to instructions concerning methods to be employed in the performance of his duties as a senior auditor. Thereafter, on November 4, 1970, the Personnel Commission adopted the proposed decision of the hearing officer as its own decision, and sustained the dismissal.

On January 4, 1971, the superior court granted appellant's amended petition for an alternative writ of mandamus. The respondents answered and filed points

and authorities in opposition. In addition, numerous affidavits, declarations and exhibits were filed by both parties. Most of these documents dealt with factual disputes as to what took place at the administrative hearing.

On February 22, 1971, a discussion took place in chambers with both parties present. The trial judge indicated that it would be difficult to resolve the issues presented by the appellant in the absence of a transcript of the administrative hearing. Appellant's requests for a free copy of the transcript and for court-appointed counsel were denied.

On February 24, 1971, both parties appeared before the court and the issues presented by the petitions, points and authorities, declarations and exhibits were argued by both parties. The court ordered the alternative writ discharged and denied the alternative writ. The court thereafter signed the findings of fact and conclusions of law and the judgment on March 8, 1971, and judgment was accordingly entered on March 9, 1971.

Appellant Failed To Present A Record To Support His Contention That the Hearing Officer's Decision Was Unsupported By Substantial Evidence.

The proceedings in this case at the trial court level present a classic illustration of the absolute necessity for a reporter's transcript at the appellate level when an attack is made upon evidence produced at a lower

level. The voluminous trial court record is replete with allegations and counter-allegations, declarations and counter-declarations, and charges and denials. The trial court could not possibly have resolved these factual disputes without a transcript of the antecedent proceedings.

Almost all of appellant's allegations at the trial court level and in his opening brief go to the issue of whether or not there was substantial evidence in the light of the whole record of the administrative hearing to support the hearing officer's decision that appellant's dismissal was justified. In *Fickeisen v. Civil Service Comm.*, 98 Cal. App. 2d 419, 420-421, it was held that when a petitioner had made such a contention, "Since it was incumbent upon the petitioner—both in mandate and certiorari—to prepare and file in the superior court a transcript of such testimony if he wished to contend that the evidence was insufficient, his failure to do so precludes an attack on the evidence on this appeal." (See also, *Ames v. City of Pasadena*, 167 Cal. App. 2d 510, 513; *Gong v. City of Fremont*, 250 Cal. App. 2d 568, 574.)

Due Process Does Not Require That the County Provide Appellant With Appointed Counsel and Free Transcripts In This Civil Action.

Appellant has attempted to liken this proceeding to a criminal prosecution by arguing that the decision of the hearing officer was a "death sentence" for him because he can no longer find employment as an auditor.

The county cannot be charged with liability unless it is liability authorized by law. (*Mattingly v. Nichols*, 133 Cal. 332.) While *Ferguson v. Keays*, 4 Cal. 3d 649, held that the Court of Appeals may waive filing fees on behalf of a poor suitor, the Supreme Court at page 654, citing *Rucker v. Superior Court*, 104 Cal. App. 683, recognized that transcripts need not be provided. "The court in *Rucker* (p. 685) also pointed out that 'there is no legal mode of requiring payment [for the transcription fees of the official reporter] . . . out of the public treasury.' *Rucker's* holding has been followed in *Agnew v. Contractors Safety Assn.*, 216 Cal. App. 2d 154, 156, [30 Cal. Rptr. 690], *Legg v. Superior Court*, 156 Cal. App. 2d 723, 724-725 [320 P. 2d 227], and *Kaufman v. Brown*, 106 Cal. App. 2d 686, 688-689 [235 P. 2d 632], each involving the cost of transcripts on appeal." Likewise, no authority is cited in support of the contention that the court is obligated to provide the appellant with counsel to be paid out of the public treasury.

Appellant's Attack on the Accounting Procedures of the School District Does Not Raise A Cognizable Issue In This Section 1094.5 Proceeding.

Appellant contends that the procedures he was directed to follow are not in accordance with what he believes to be good CPA standards. The separation of powers requirement of article III, section I, of the California Constitution precludes this court from considering such an issue in a mandamus proceeding un-

der section 1094.5 of the Code of Civil Procedure. The requirement of sufficient evidence to support a finding of insubordination is satisfied by proof that the employee was instructed to perform in a lawfully prescribed manner and that he then deliberately failed to do so. The propriety of the instructions and procedures used by the auditing department of the Los Angeles School District is not a relevant issue in this proceeding because it relates neither to due process nor to the judicial function.

The Record Shows That Appellant Was Afforded His Right To A Fair Hearing Under the Requirements of Personnel Commission Rule 735.

Appellant contends that he was denied a fair hearing because Personnel Commission Rule 735(K) provides that the burden of proof in an appeal to the Personnel Commission is upon the person dismissed. Appellant could indeed argue that his hearing was fundamentally unfair if he had not been presented with a written letter of dismissal specifying the charges against him, and if at the hearing he had borne the burden of going forward without knowing why he was being discharged. However, this was not the situation.

Personnel Commission Rule 735(G) provides that "The Personnel Division shall, within 10 days of suspension, demotion, or dismissal, file written charges with the Personnel Commission. The employee shall be furnished with a copy of such charges . . ."

Furthermore, Personnel Commission Rule 735(K) states in part that "the officer or officers of the Board of Education responsible for the . . . dismissal . . . shall first present the case to the commission. An equal opportunity will then be afforded the appealing employee." The appellant was, in fact, furnished with a detailed list of the charges against him, and the school district did, in fact, put on its case first.

Thus, although Rule 735(K) does state that "the burden of proof is upon the person . . . dismissed," an appellant in a hearing before the Personnel Commission does not bear all the obligations traditionally considered to be embodied within the term "burden of proof." The burden of going forward with the evidence initially lies with the school district. The burden of producing evidence shifts to the dismissed employee only after the school district has put on its case. For all practical purposes, then, the reference to "burden of proof" in Rule 735(k) refers to the burden of going forward once a rebuttable presumption has been established by the school district.

As the declaration of the hearing officer indicates, because the school district proceeded first in the hearing, the hearing officer assumed that the school district carried the burden of proof and was unaware of the provisions of Personnel Commission Rule 735(k) regarding the burden of proof. This declaration is apparently supported by the hearing officer's actual decision, in which he states, "all allegations or charges against the appellant not found to be true are now found to be untrue."

Other contentions advanced by appellant are regarded as not sufficiently substantial to merit further discussion and are rejected on the basis of the authorities cited and the arguments set forth in respondents' brief.

The judgment is affirmed.

NOT FOR PUBLICATION.

HERNDON, Acting P.J.

We concur:

FLEMING, J.

COMPTON, J.

APPENDIX "D"

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

San Francisco, California 94102

MAY 18, 1972

DEAR SIR: *I have this day filed Order*

HEARING DENIED

In re: 2 Civ. No. 38841

Wocher

vs.

L.A. Board of Education

Respectfully,

G. E. BISHEL,
Clerk

APPENDIX "E"

PERSONNEL COMMISSION RULE 735(K)

K. The Commission shall begin the hearing within a reasonable length of time from the day the appeal is received and the investigation and the hearing shall be confined to the reasons for action as charged by the Board of Education and relevant defenses set forth in the appeal. The burden of proof is upon the person suspended, demoted, or dismissed. The officer or officers of the Board of Education responsible for the suspension, demotion, or dismissal, as designated by the Personnel Division, shall first present the case to the Commission. An equal opportunity will then be afforded the appealing employee. Witnesses desired by either side shall be subpoenaed by the Commission. At the conclusion of the hearing the matter will be given consideration either in open or executive session after which a decision shall be made. The accused employee may waive his rights to public hearing.

APPENDIX "F"

LOS ANGELES UNIFIED SCHOOL DISTRICT
PERSONNEL COMMISSION

735

LAW AND RULES AUGUST 14, 1972

K. The Commission shall begin the hearing within a reasonable length of time from the day the appeal is received, and the investigation and the hearing shall be confined to the reasons for action as charged by the Board of Education and relevant defense set forth in the appeal. The designated representative of the Board of Education shall proceed first in the presentation of evidence. An equal opportunity will then be afforded the appellant. Witnesses desired by either side shall, if requested, be subpoenaed by the Commission. At the conclusion of the hearing, the matter will be given consideration either in open or executive session, after which a decision shall be made in public meeting. The appellant may waive his rights to a public hearing.

CHANGE:
Amending Paragraph K deleting reference to "burden of proof."

Remove: February, 1960, page 7 of 7. Add: August 14, 1972, page 7 of 8.

Causes and Procedures for Suspension, 735
Demotion, Dismissal Page 7 of 8